STATE OF MICHIGAN

IN THE SUPREME COURT

SHIRLEY RORY and
ETHEL WOODS,

Plaintiffs/Appellees,

v.

CONTINENTAL INSURANCE COMPANY,
a CNA COMPANY

Defendant/Appellant,

_____/

Supreme Court No. 126747

Court of Appeals No. 242847

Lower Court No. 00-027278-CK

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Court Rules

Other

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Amicus curiae Farm Bureau General Insurance Company of Michigan ("Farm Bureau") accepts and relies on the statement identifying order appealed from and relief sought submitted by Continental Insurance Company ("appellant").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Farm Bureau accepts and relies on the statement of facts submitted by appellant.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Farm Bureau adopts the statement of interest from its *amicus curiae* brief.

ARGUMENT

I. CONTRARY TO THE ARGUMENT OF *AMICUS CURIAE* COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES, MCL 500.2254 DOES NOT PRECLUDE A CONTRACTUAL ONE-YEAR LIMITATIONS PERIOD IN UNINSURED OR UNDERINSURED MOTORIST COVERAGE.

A. Introduction.

An *amicus curiae* brief dated February 24, 2005 has been filed on behalf of the Commissioner of the Office of Financial and Insurance Services (OFIS). The brief asserts that a one-year limitations period (or any period other than the six-year statute of limitations applicable to contract actions) in an insurance policy is barred by MCL 500.2254.[1] That is an argument not raised below or by the Court of Appeals in this case, although the same argument was recently rejected by the Michigan Court of Appeals in an unpublished decision in *Robinson v. Allied Ins Co* and *Campbell-West v.*

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[1]MCL 500.2254 provides:

> "Suits at law may be prosecuted and maintained by any member against a domestic insurance corporation for claims which may have accrued if payments are withheld more than 60 days after such claims shall have become due. No article, bylaw, resolution or policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, bylaw, provision or resolution shall hereafter be a bar to any suit in any court in this state: Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant."

Farm Bureau General Ins Co, Docket Nos. 247375 and 251003, rel'd August 3, 2004. A copy of that opinion is Exhibit A.

Farm Bureau has filed this supplemental *amicus curiae* brief to bring to the Court's attention case authority and statutes demonstrating the error in OFIS' claim that MCL 500.2254 bars any insurance contract limitations period shorter than six years.

B. Summary of OFIS' position.

OFIS' argument may be summarized as follows:

- Section 2254 states a rule that no insurance policy may bar or prohibit a policyholder from filing suit against the insurer, other than the two exceptions stated in that statute. OFIS characterizes this as a "rule prohibiting policy limitations or deadlines." (OFIS' brief, p. 4).
- The statute allows only two "exceptions" to the rule, namely, the policy can require the claimant to first exhaust any alternative remedies provided, and the insurer has six months to decide the claim before suit may be filed. *(Id.*, p. 6).
- Under the maxim *expressio unius est exclusio alterius*, section 2254 means "that other conditions cannot be imposed on top of the two already created." (*Id.*, p. 6).
- When the phrase "No...policy provision...prohibiting a member or beneficiary from commencing and maintaining suits at law or equity shall be valid..." is placed in its "contextual understanding," section 2254 "compels the conclusion that the insurer's shortened filing deadline is unauthorized and invalid." (*Id.*, pp. 5-6). A provision limiting the time in

which suit may be brought is equivalent to "an outright prohibition on filing suit." (*Id.*, p. 5).

C. The Court of Appeals has specifically rejected the same argument made by OFIS.

The OFIS' *amicus curiae* brief essentially re-states the holdings of the trial courts in *Robinson v. Allied* and *Campbell-West v. Farm Bureau, supra.* In both of those cases the trial courts had found one-year suit limitations periods in insurance policies to be in violation of MCL 500.2254, because the effect of the provisions (where not complied with by the insureds) was to "prohibit" suit.

The Court of Appeals reversed. The Court held one-year contractual limitations periods do not violate MCL 500.2254 because they are merely conditions to filing suit and do not forbid plaintiffs from commencing and maintaining suits:

> "Plaintiffs assert that the contractual limitation provisions violate the statute because they prohibit actions filed beyond one year. Specifically, plaintiffs contend that the statute invalidates any provision within an insurance policy that has the effect of prohibiting the commencement or maintenance of *any* suit. Our plain reading of the statute does not support plaintiff's interpretation because the statute merely states that insurance companies may not adopt policy provisions prohibiting the commencement or maintenance of a suit, and that any such prohibition will not be a bar to any suit. It does not prevent the insertion of provisions that only place a condition on filing suit without providing an outright bar to their commencement. MCL 500.2254." Exhibit A, p. 6. (Emphasis added).

The Court in *Robinson* and *Campbell-West* expressly rejected the same argument now raised by OFIS, that a contractual provision limiting the time in which suit may be brought is the same as "prohibiting" suit, and the so-called exceptions in the statute preclude any other conditions on filing suit:

> "Plainly, the use of the word 'prohibiting' refers to an absolute bar to the commencement and maintenance of suits rather than to conditions placed

on the commencement and maintenance of suits, and we conclude [the trial court's] determination that MCL 500.2254 allows only two conditions to be placed in insurance contracts is erroneous. The trial court, in essence, applied the maxim of *expressio unius est exclusio alterius*, providing that the Legislature's express mention of one thing in a statute generally implies that it meant to exclude similar things it did not mention. [Citations omitted.] The maxim is only an aid in determining legislative intent. [Citation omitted.] The maxim is inapplicable here because the provisions within MCL 500.2254 relied on by the trial court are not an express mention by the Legislature of conditions that insurers may provide in contracts. Rather, they are duties the Legislature has imposed on insureds to exhaust available remedies before filing suit and on insurers to promptly pass upon claims." Exhibit A, pp. 6-7. (Emphasis added).

Finally, the Court of Appeals supported its holding by a comparison of section 2254 with MCL 500.4046(2), which expressly prohibits a contractual suit limitations period less than six years, but is applicable only to life insurance policies:

> "We also note for comparison purposes, that MCL 500.4046(2), also contained within the Insurance Code of 1956 but pertaining only to policies for life insurance, expressly prohibits the inclusion of a provision limiting the time a suit may be commenced to less than six years. MCL 500.2254, however, is a general provision governing disability, surety, casualty, and also life insurance policies, and contains no such express prohibition against limiting the time an action may be commenced. It states only that no policy provision may be adopted 'prohibiting a member or beneficiary from commencing or maintaining suits...' We view this distinction as intentional, and conclude that MCL 500.2254 may not be construed to prevent the inclusion of provisions that do not act as a complete bar to filing suit, but only limit the time it may be done." Exhibit A, p. 7. (Emphasis added).

The Court of Appeals in *Robinson* and *Campbell-West* was clearly correct in rejecting the arguments now raised by OFIS.

D. OFIS' argument is contrary to the plain language of the statute as well as the historical context.

Respectfully, OFIS' reasoning is flawed and inconsistent with Michigan law. Its argument invokes the maxim *expressio unius est exclusio alterious*–the express mention in a statute of one thing implies the exclusion of other similar things. *Stowers*

v. *Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 (1971). That maxim is but a tool to assist in ascertaining the Legislature's intent. It does not automatically lead to results, *Luttrell v. Dept of Corrections*, 421 Mich 93,107; 365 NW2d 74 (1984).

The maxim has no application here because OFIS' asserted exceptions in the statute–requiring that remedies provided by the company be exhausted before filing suit and that the company shall have six months to pass upon a claim–are not similar to a contract provision establishing the time in which a legal action may be brought. Rather, they place a duty on members and beneficiaries to exhaust contract remedies and a duty on insurers to promptly pass upon claims, thus protecting members and beneficiaries from an insurer's protracted inaction which might, in light of the exhaustion requirement, otherwise indefinitely delay resolution of the claim.

The historical background to the enactment of what is now MCL 500.2254 demonstrates that the proviso clauses preserved the common law exhaustion of remedies requirement and are not similar to a contractual limitations period.

The roots of the statute are found in provisions authorizing mutual benefit societies. It was common for the articles and by-laws of such organizations to provide adjustment tribunals and appeal boards or similar mechanisms to hear and decide members' disputed claims for benefits, and to make the decision of the appeal board final and binding without recourse to the courts. The rule was stated in *Patrons' Mut Fire Ins Co* v. *Attorney General*, 166 Mich 438, 442; 131 NW 1119 (1911):

> "The doctrine is well established in this state that members of a voluntary society may set up a tribunal to adjust the differences that arise between the association and its members, and make its decision final in the absence of bad faith or a refusal to act or to pay after an adjudication has taken place." (Citations omitted.)

See also, *Bone* v. *Grange Mut Fire Ins Co of Michigan*, 215 Mich 396; 184 NW 406 (1921), *Russell* v. *North American Benefit Ass'n*, 116 Mich 699; 75 NW 137 (1898), *Fillmore* v. *The Great Camp of Knights of the Maccabees for Michigan*, 103 Mich 437; 61 NW 785 (1895), and *Hembeau* v. *The Great Camp of Knights of the Maccabees for Michigan*, 101 Mich 161; 59 NW 417 (1894).

This rule allowing agreed-upon supreme tribunals to be the final determiners of claims was not absolute though, as the courts retained the equitable power to grant relief where there was bad faith, fraud, accident or mistake, *Palmer* v. *Patrons' Mut Fire Ins Co, Ltd, of Michigan*, 217 Mich 292, 299; 186 NW 511 (1922), or even where the decision of the supreme tribunal was affected by an error of law. *Howe* v. *Patrons' Mut Fire Ins Co of Michigan,* 216 Mich 560, 569; 185 NW 864 (1921). Thus, although the rule was sometimes stated in more absolute terms, i.e., that a mutual benefit society could establish provisions to make its own appeal board the final determiner of claims and the same would not allow recourse to the courts in the absence of bad faith, other courts treated such provisions merely as an exhaustion of remedies requirement. In *Bone* v. *Grange Mut, supra,* 215 Mich 396, 400, the Court said:

> "This court has repeatedly held that such provisions are valid and that the insured cannot avail himself of his legal remedy until he has exhausted the remedy provided for by such reasonable rules and regulations of the mutual company to which he belongs."

The Court in *Bone* addressed membership articles and by-laws that were entered into prior to enactment of 1917 P.A. 256, and that act was not mentioned by the Court, but the summary of the rule quoted in *Bone* is remarkably similar to the exhaustion of

remedies proviso in 1917 P.A. 256, Part Two, Chapter I, §8, now MCL 500.2254. See also, *New Era Life Ass'n* v. *Zangbell*, 266 Mich 371, 377; 254 NW 134 (1934), holding:

> "It has long been held in this State that fraternal beneficiary associations may properly require members to exhaust their remedies within the society before resorting to the courts. [Citations omitted.] And the mere rejection of a claim by the tribunal first resorted to within the association does not give the claimant the right to institute a suit without finally exhausting his remedies within the order."

Thus, 1917 P.A. 256, Part Two, Chapter I, §8 and subsequent enactments adopting essentially the same language preserved members' and beneficiaries' access to the courts by making void any provision "prohibiting" suits, but also maintained the ancillary requirement that members and beneficiaries exhaust reasonable remedies established by the mutual benefit association, in light of such internal remedies' salutary purpose of providing "'a simple and inexpensive method for the prompt adjustment and settlement of claims.'" *Maryland Casualty Co* v. *McGee*, 32 Mich App 539, 546; 189 NW2 44 (1971), quoting *Shapiro* v. *Patrons' Mut Fire Ins co of Michigan*, 219 Mich 581, 586; 189 NW 202 (1922).

The statute's two provisos are not similar to the requirement in modern insurance policies establishing the time in which a legal action may be brought. Therefore, the maxim that the express mention of one thing implies the exclusion of other similar things is inapposite.

E. Shortening the time for suit is prohibited only for life insurance policies.

OFIS' conclusion that section 2254 was intended to preclude any contractual period of limitations cannot stand in light of another provision added in 1917 (and which is still the law today), specifically precluding a contract provision which shortens the

period for filing suit, but making that provision applicable only to life insurance contracts. 1917 P.A. 256, Part Three, Chapter II, §4, addressed provisions which may not be included in any policy of life insurance. That section, added to the law at the same time as Part Two, Chapter I, §8 quoted above, states:

> "No policy of life insurance shall be issued or delivered in this State if it contains any of the following provisions:
>
> * * *
>
> "Second, A provision limiting the time within which any action at law or in equity may be commenced to less than six years after the cause of action shall accrue;" (Exhibit I).

This provision was adopted essentially unchanged in the Insurance Code of 1956, 1956 P.A. 218, §4046(2), and remains today in MCL 500.4046(2).

OFIS now urges the Court to write into the statute what the Legislature expressly rejected. "Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to authorize what the Legislature explicitly rejected." *In re MCI*, 460 Mich 396, 415; 596 NW2d 164 (1999). As to life insurance contracts the Legislature chose to expressly prohibit any contractual provision that would reduce the six-year statute of limitations for filing suit on the contract; however, at the same time it rejected that option in what is now codified as MCL 500.2254, choosing instead to make void only provisions "prohibiting a member or beneficiary from commencing and maintaining suits...". (Emphasis added). The omission of a provision in one part of a statute that is included in another part should be construed as intentional. *People v. Ballenger,* 227 Mich App 637, 646; 576 NW2d 708 (1998). See also *Witkowski* v. *Fidelity & Casualty Co of New York*, 218 Mich 21, 24; 187 NW 267 (1922), holding with respect to 1917 P.A. 256, that "no attempt was made

to prevent indemnity companies [as opposed to life insurance companies] from limiting the time for beginning suit on the policies issued by them." See also, *Banza v Metropolitan Life Ins Co*, 281 Mich 532; 275 NW 238 (1937), holding that the predecessor to MCL 500.4046(2) applied only to life insurance contracts, not other types of insurance.

This is compelling evidence against OFIS' interpretation. Since MCL 500.2254 applies to life insurance contracts, a conclusion that the statute precludes a contractual limitation period would render MCL 500.4046(2) redundant and unnecessary. If §2254 was intended to prohibit contractual shortening of the statute of limitations, it would be unnecessary to make such an express prohibition as to life insurance contracts in §4046(2). Particularly since the forerunners of these two sections were enacted at the same time in 1917 P.A. 256, OFIS' interpretation is unacceptable and violates the rule that, wherever possible, all words in a statute must be given effect and none rendered a nullity. *Wickens v Oakwood Healthcare System,* 465 Mich 53, 60; 631 NW2d 686 (2001).

F. A time restriction for filing suit is not a prohibition of suit; MCL 500.2254 should not be construed to promote an absurd result.

A contract provision requiring that any suit against the company be brought with one year is simply not a "prohibition" of suits. This Court and the Court of Appeals have recognized a distinction between prohibiting access to courts and mere procedural restrictions. For example, it has been held that a statute of limitations is a procedural rather than substantive requirement, which denies due process only where it is so harsh and unreasonable that it effectively divests the plaintiff of access to the courts intended

by a substantive right. Where a statute of limitations provides a reasonable amount of time for claims to be brought, even though the time is shortened, access to the courts is not denied and there is no due process violation. *Bissell* v. *Kommareddi*, 202 Mich App 578, 581; 509 NW2d 542 (1993), and *Forest* v. *Parmalee*, 402 Mich 348; 262 NW2d 653 (1978). Access to courts is a fundamental right but provisions that merely restrict access, rather than deny access, do not amount to a denial of the right. *Rodriguez* v. *Grand Trunk Western Railroad Co*, 120 Mich App 599; 328 NW2d 89 (1982).

OFIS' reasoning would bring about absurd results. The logical effect would be to view the statute as nullifying any provision in a contract of insurance that results in non-recovery in a suit by viewing it as prohibiting a suit. For example, violating a notice of suit provision may preclude recovery in a suit. *Koski v Allstate Ins Co*, 456 Mich 439, 447-448; 572 NW2d 636, *reh den*, 456 Mich 1230; 576 NW2d 168 (1998). Similarly, misrepresenting a material fact relating to a claim may void a policy, *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 527, 532; 620 NW2d 840 (2001), and prohibit a suit, but only in the overly strained sense that enforcing the contractual provision results in no recovery in a suit.

OFIS' reasoning is flawed because it fails to recognize the distinction between a policy provision that prohibits suit (invalidated by the statute), and the insured's failure to comply with the requirements of the policy which may have the effect of precluding recovery in a lawsuit against the company. The latter merely follows from the operation of lawful policy language and is not in violation of the statute because it does not in the first instance "prohibit" a suit. A timely filed suit is permitted. Yet, according to OFIS' analysis, all of these examples would be ones where the policy "prohibits" the insured

from commencing or maintaining a legal action, and hence violates MCL 500.2254. The same would be true for other policy requirements, such as that the loss occur within the policy's period of coverage. Treating the enforcement of contractual provisions that result in no recovery in a suit as "prohibiting" a suit would thus logically lead to the absurd result that any contractual provision disallowing recovery is unenforceable.

Courts will not construe a statute so as to achieve an absurd or unreasonable result. *Luttrell v Dept of Corrections*, *supra,* 421 Mich 93, 106. OFIS' asserted reading of MCL 500.2254 is a drastic departure from Michigan law and, if allowed to become the law of this state, would have consequences far beyond contractual suit time limitations provisions.

G. The statutory provision relates to mutual benefit associations providing quasi-insurance, not to traditional insurers.

As noted, section 2254 has its origins, in part, in legislation enacted to encourage and regulate mutual benefit associations. These organizations often provided, either as their primary purpose or as an ancillary benefit, programs by which members paid certain assessments in consideration for the payment of benefits to a member upon disability or payments to a member's beneficiary in the event of the member's death. These programs were in some ways in the nature of insurance, though mutual benefit societies were (and still are) excepted from regulations applicable to insurance companies. This was explained in *Resenhouse* v. *Seeley*, 72 Mich 603, 617-618; 40 NW 765 (1888):

> "A majority, if not all, of the United States insurance companies, either home or foreign, are only allowed to do business upon compliance with specified conditions. In order, however, to encourage the formation of benefit societies, the advantages of which have been appreciated by legislatures, there is express provision in most, if not all, the states for the

> organization of mutual benefit and co-operative associations. These associations, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his beneficiary a benefit upon the happening of a specified contingency. Although they may also partake of the nature of fraternal societies, yet whether the benefit be paid for sickness, or to accumulate a fund out of which payments are to be made to deceased members, the contract falls within the definition of an insurance contract." (Emphasis added).

That case illustrates the historical context of "member or beneficiary" when mutual benefit associations were in the vogue as an alternative to traditional insurance. Numerous acts and amendments were passed in the late nineteenth and early twentieth centuries providing for mutual benefit and cooperative associations as well as local and trade-specific mutual insurance companies. These are collected in the Historical and Statutory Notes to MCL 500.2254. Mutual benefit associations became blended into mutual insurers but without broadening "members or beneficiaries" into all insureds, even those of traditional insurers.[2]

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[2]The statutory language at issue first appeared in 1917 P.A. 256, Part Two, Chapter I, §8, which provided:

> "All companies formed under this act shall be deemed bodies corporate and politic, in fact and in name, and shall be subject to all of the provisions of law in relation to corporations as far as they are applicable. Suits at law may be maintained by corporations formed under this act against any of its members for any cause relating to the business of such corporation; also suits at law may be prosecuted and maintained by any member against such corporation for claims which may have accrued if payments are withheld more than sixty days after such claims shall have become due. No article, by-law, resolution or policy provision adopted by any life and casualty insurance company doing business in this State prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, by-law, provision or resolution shall hereafter be a bar to any suit in any court in this State: *Provided, however,* That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit; *Provided further, however,* That the company shall finally pass upon any claim

The plain words of the statute, both as originally enacted and in its current form, indicate it applies to members and beneficiaries, and not to insureds under traditional insurance policies.

> submitted to it within a period of six months from and after final proofs of loss or death shall have been furnished any such company by the claimant."

Previous acts applicable to mutual insurance companies had contained language essentially identical to the first two sentences of 1917 P.A. 256, Part Two, Chapter I, §8, but the remainder of the section was new in 1917. The 1917 statute remained unchanged until enactment of the Insurance Code of 1956, 1956 P.A. 218, §2254. The 1956 act dropped the first sentence and the first clause of the second sentence, apparently as being redundant, but the remainder of the 1917 statute remained essentially unchanged. The other changes were that the 1956 enactment referred to "domestic insurance companies" in place of "corporations formed under this act"; and it referred to disability and surety insurance, in addition to life and casualty insurance which the prior versions had addressed.

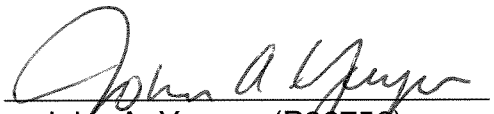
CONCLUSION

For all of these reasons, *amicus curiae* Farm Bureau General Insurance Company of Michigan requests the Court to reject the argument of *amicus curiae* Office of Financial and Insurance Services that a one-year contractual limitations period is void under MCL 500.2254. Farm Bureau requests the Court to hold that a one-year suit limitation provision is enforceable, and to reaffirm the principle that unambiguous contract provisions will be enforced as written.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

Dated: February 28, 2005

BY: 

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STATE OF MICHIGAN

COURT OF APPEALS

MOSES ROBINSON and GWENDOLYN LEWIS,

Plaintiffs-Appellees,

v

ALLIED INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 3, 2004

No. 247375
Kent Circuit Court
LC No. 02-003347-CZ

JANE CAMPBELL WEST and JOE ELDON WEST, JR.,

Plaintiffs-Appellees,

v

FARM BUREAU GENERAL INSURANCE CO.,

Defendant-Appellant.

No. 251003
Charlevoix Circuit Court
LC No. 02-001558-CH

Before: Fort Hood, P.J., Donofrio and Borrello, JJ.

PER CURIAM.

In Docket No. 247375, defendant Allied Insurance Company appeals as of right from an order denying its motion for summary disposition and a subsequent order granting plaintiffs' motion for summary disposition. In Docket No. 251003, defendant Farm Bureau General Insurance Company appeals as of right from an order denying its motion for summary disposition. We consolidated these actions to address the issue of whether MCL 500.2254 prohibits insurers from including provisions in their policies limiting the insureds may file suit to collect benefits that have been denied to less than the time provided in the applicable statute of limitations. We hold that it does not. Because plaintiffs in Docket No. 247375 did not file their action within the one-year limitation period provided in their insurance contract, after applying judicial tolling, we conclude plaintiffs' action was barred, and reverse the trial court's order

denying defendant's motion for summary disposition. In Docket No. 251003, because of the operation of the judicial tolling doctrine, we affirm the trial court's order denying defendant Farm Bureau's motion for summary disposition.

FACTS AND PROCEDURAL HISTORY

Docket No. 247375

In Docket No. 247375, plaintiffs Robinson[1] obtained a homeowners' property insurance policy from defendant Allied through their mortgage lender. Defendant issued the policy on December 18, 2000, with an expiration date of December 18, 2001. However, defendant cancelled the policy on February 26, 2001 after an inspection of plaintiffs' property revealed safety and building code violations. The policy contained a provision stating, "Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss."

According to plaintiff Moses Robinson, he became aware of a problem with his home when he received two abnormally high water bills. Sometime during the period when his daughter, Ghainne Robinson, was home from college for Christmas break in December 2000, plaintiffs discovered a leak in the home's water heater. The leak flooded the basement and damaged the furnace and many of plaintiffs' clothes and personal items. Robinson stated that he obtained a new water heater on January 4, 2001, but was unable to install it or present a claim to defendant until spring of 2001 because he was seriously ill. Robinson also stated that he did not initially know who his insurance carrier was or that his insurance policy covered the loss.

Robinson reported plaintiffs' claim to defendant on August 17, 2001, claiming that the loss occurred in December 2000 before the policy was cancelled. Defendant's claims adjuster, Barry Frodge, inspected plaintiffs' home and obtained a recorded statement on August 30, 2001. According to Robinson's affidavit testimony, Frodge called him approximately a week after the meeting and made a settlement offer of $3,000, that Robinson rejected. Frodge sent a letter to plaintiffs on September 6, 2001 denying their claim because, based on defendant's investigation, the exact date that the leak occurred could not be ascertained. It also stated that the water bills plaintiffs had provided during Robinson's recorded statement indicated the loss occurred after plaintiffs' policy had been cancelled on February 26, 2001. The letter quoted several provisions from plaintiffs' policy regarding losses that were not covered by it, as well as certain conditions that an insured must fulfill before a claim would be paid.

On September 17, 2001, plaintiffs sent Frodge a letter and an itemized list of damages claiming their losses exceeded $30,000, but stating that they would accept $10,000 if defendant remitted payment before October 1, 2001. On October 2, 2001, plaintiffs' attorney sent a letter to Frodge requesting a copy of plaintiffs' policy asking why their claim had been denied. Frodge responded to the October 2, 2001 inquiry on November 19, 2001 with a letter reiterating that

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[1] According to affidavits introduced in the trial court, plaintiff Gwendolyn Lewis now goes by the name Gwendolyn Lewis-Robinson.

plaintiffs' claim was denied because the damage had not been discovered until after plaintiffs' policy had been cancelled. The letter did not restate the policy provisions. On December 13, 2001, plaintiffs' counsel sent another letter to Frodge stating that he believed plaintiffs' loss did occur within the policy period, and attaching copies of plaintiffs' water bills that revealed an increased amount of water usage in the last quarter of 2000. On December 21, 2001, Frodge responded with another letter stating that the documentation plaintiffs had provided to support their contention that the water leak had occurred in the last quarter of 2000 demonstrated that the loss occurred, not after the cancellation date, but before the policy became effective on December 18, 2001. Again, the letter did not restate the policy provisions.

Plaintiffs filed suit on April 2, 2002, approximately one and a half years after they discovered the leak in December 2000, alleging that defendant had wrongfully denied their claim. Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), asserting there was no genuine issue of fact that their loss occurred within the policy period. After answering plaintiffs' complaint, defendant filed its own motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) asserting that plaintiffs' claim was barred by the contractual one-year limitation period. Following a hearing on defendant's motion only, the trial court issued a written opinion denying defendant's motion based on its determination that MCL 500.2254 prohibits the inclusion of such contractual limitation periods in policies for insurance.

Thereafter, the trial court issued a second written opinion granting plaintiffs' motion for summary disposition, determining that plaintiffs had introduced sufficient evidence to sustain their burden of proving that no genuine issue of fact existed regarding whether their loss occurred after the policy took effect. The court relied on plaintiff Gwendolyn Lewis-Robinson and Ghainne Robinson's affidavits stating that the loss occurred during the Christmas holiday when Ghainne Robinson was home from college for Christmas break, and that plaintiff had discovered the leak sometime between Christmas and New Year's. The trial court also determined that defendant had affirmatively withdrawn the other defenses it had stated in its September 6, 2001 denial letter by not reasserting them in its subsequent letters, and that those defenses were not preserved by a reservation of rights clause that defendant had included in each of the three denial letters that it sent to plaintiffs.

Docket No. 251003

In Docket No. 251003, plaintiff Jane West was injured in an automobile accident on June 20, 1999.[2] At the time of the accident, plaintiffs maintained an automobile insurance policy with defendant Farm Bureau Insurance Company in accordance with the Michigan no-fault automobile insurance act, MCL 500.3101 *et seq.* The policy included a provision for $100,000

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[2] Plaintiffs state the date of the accident as June 30, 1999 in their complaint. However, defendant stated June 20, 1999 as the date of the accident in its answer, motion for summary disposition, at the subsequent hearing, and in an affidavit provided by its claims adjuster. Plaintiffs did not seek to correct this assertion. Nonetheless, the exact date of the accident is inconsequential to our resolution of the issues presented.

of underinsured motorist coverage, and also contained a clause stating that "[n]o claimant may bring a legal action against the company more than one year after the date of the accident."

On September 5, 2002, more than three years and two months after the accident, plaintiffs filed suit alleging that plaintiff Jane West had sustained serious impairment of body function as a result of the accident, and that defendant had breached its contract with plaintiffs by failing to remit $100,000 in underinsured motorist benefits under the policy. Plaintiff Joe West also claimed a loss of consortium.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) based on plaintiffs' failure to commence their action within the one-year contractual limitation period provided in the policy. Following a hearing, the trial court, relying on the reasoning set forth in the written opinion by the trial court in Docket No. 247375, denied defendant's motion on the ground that the contractual one-year limitation period contained in the policy was invalid under MCL 500.2254. As an alternative ground, the trial court also held that the one-year limitation period, even if not invalidated by MCL 500.2254, was tolled because defendant had never formally denied plaintiffs' claim.

ANALYSIS

In this appeal, both defendants Allied and Farm Bureau assert that the trial courts erred in denying their motions for summary disposition by determining that the one-year limitation periods contained in their policies are invalid under MCL 500.2254. Both defendants also assert that plaintiffs failed to file suit within the one-year limitation periods, thus barring their claims. In addition, defendant Allied also asserts that the trial court in Docket No. 247375 erred in granting plaintiffs' subsequent motion for summary disposition based on its determination that there was no genuine issue of fact regarding whether plaintiffs' loss occurred within the policy period, and that defendant was barred from asserting any defenses stated in its September 6, 2001 letter of denial other than that the loss did not occur within the effective dates of the insurance policy.

I. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co,* 464 Mich 456, 461; 628 NW2d 515 (2001). Whether MCL 500.2254 prohibits the insertion of limitation periods less than the applicable statute of limitations within insurance policies presents an issue of statutory interpretation, which is a question of law that is also reviewed de novo. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Finally, this Court also reviews de novo the issue of whether a limitations period precludes a party's pursuit of an action. *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

A motion for summary disposition pursuant to MCR 2.116(C)(7) is appropriate where "[t]he claim is barred because of . . . statute of limitations." *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238; 625 NW2d 101 (2001). All well-pleaded factual allegations and documentary evidence is construed in the plaintiff's favor, and summary disposition is only appropriate where reasonable minds could not differ as to whether the plaintiff's action is barred by the limitation period. *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich App 72, 77; 592 NW2d 112 (1999). A motion under MCR 2.116(C)(8) is appropriately granted when,

accepting all well-pleaded factual allegations as true and construing them in the light most favorable to the plaintiff, the claims alleged in the complaint are clearly unenforceable as a matter of law and no factual development could justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119-120; 461 NW2d 817 (1999). A motion under MCR 2.116(C)(10) is appropriately granted when, viewing the documentary evidence submitted by the parties in a light most favorable to the nonmoving party, no genuine issue of material fact exists except as to the amount of damages and the moving party is entitled to judgment as a matter of law. *Id.* at 120; MCR 2.116(C)(10).

II. MCL 500.2254

Defendants argue that the trial courts erred when they found that the one-year limitation periods contained in their policies were invalid under MCL 500.2254. Specifically, defendants argue that the one-year contractual limitations periods do not violate MCL 500.2254 because they are merely conditions and thus, are not provisions "prohibiting a member or beneficiary from commencing and maintaining suits." Because the one-year limitations provided in the respective contracts do not forbid or prevent plaintiffs from "commencing and maintaining suits," and merely provide that any such suits must be brought within one-year, we agree.

MCL 500.2254 provides:

> Suits at law may be prosecuted and maintained by any member against a domestic insurance corporation for claims which may have accrued if payments are withheld more than 60 days after such claims shall have become due. No . . . policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such . . . provision . . . shall hereafter be a bar to any suit in any court in this state: Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant.

Under MCL 600.5807(8), the statute of limitations for filing an action "to recover damages or sums due for breach of contract" is six years unless another period is specified for the specific type of contract in MCL 600.5807(1) through (7). The six-year period provided in MCL 600.5807(8) applies to insurance contracts. *Monti v League Life Ins Co*, 151 Mich App 789, 796; 391 NW2d 490 (1986). Our Supreme Court adopted the rule that the limitation period must be tolled "from the time the insured gives notice until the insurer formally denies liability" in order to ensure that an insured has the full twelve-month period to commence the action. *The Tom Thomas Organization, Inc, v Reliance Ins Co*, 396 Mich 588, 592, 596-597; 242 NW2d 396 (1986). The trial court in Docket No. 247375, however, concluded that the common law general rule has been abrogated by MCL 500.2254, a determination the trial court in Docket No. 251003 adopted. Specifically, the trial court in Docket No. 247375 focused on the "absent statute" language contained within the general rule, *Tom Thomas, supra,* 592 and determined that MCL 500.2254 prevents the application of the general rule to contracts of insurance.

The primary purpose of statutory construction is to discern and give effect to the intention of the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). In doing so, the first step is to review the language of the statute itself. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999) "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Moreover, "[i]t is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory," and "a court should refrain from speculating about the Legislature's intent beyond the words employed in the statute." *MCI, supra,* 414-415. "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Sun Valley, supra,* 236.

"Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning." *Robertson, supra*, 748, citing MCL 8.3a; *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). "Prohibit" is defined as "to forbid (an action, activity, etc.) by authority or law," or "to forbid the action of (a person)," or "to prevent; hinder." *Random House Webster's College Dictionary* (1997), 1040-1041.

Plaintiffs assert that the contractual limitation provisions violate the statute because they prohibit actions filed beyond one year. Specifically, plaintiffs contend that the statute invalidates any provision within an insurance policy that has the effect of prohibiting the commencement or maintenance of *any* suit. Our plain reading of the statute does not support plaintiffs' interpretation because the statute merely states that insurance companies may not adopt policy provisions prohibiting the commencement or maintenance of a suit, and that any such prohibition will not be a bar to any suit. It does not prevent the insertion of provisions that only place a condition on filing suit without providing an outright bar to their commencement. MCL 500.2254.

Despite initially recognizing that the contractual limitation periods are a condition to an insured's ability to file suit rather than a prohibition, the trial court in Docket No. 247375 concluded that MCL 500.2254 voids the inclusion of such conditions in insurance policies. The trial court relied on the statute's statements that "Provided, however," an insured must exhaust all reasonable remedies for adjudicating claims provided in the contract before filing suit and "further" that the insurer must "finally pass" upon an insured's claim within six months of the insured's providing "final proofs of death or loss." The trial court reasoned that the term "prohibiting" as used in the statute does not refer to provisions absolutely barring the commencement of a suit, but refers to the setting of conditions. The trial court determined that MCL 500.2254 permits insurers to include only two conditions within policies: that insureds (1) exhaust any alternative remedies before filing suit, and (2) wait six months after submitting a claim before filing suit. The trial court in Docket No. 251003 agreed.

Plainly, the use of the word "prohibiting" refers to an absolute bar to the commencement and maintenance of suits rather than to conditions placed on the commencement and maintenance of suits, and we conclude its determination that MCL 500.2254 allows only two conditions to be placed in insurance contracts erroneous. The trial court, in essence, applied the maxim of *expressio unius est exclusio alterius*, providing that the Legislature's express mention

of one thing in a statute generally implies that it meant to exclude similar things it did not mention in the statute. *Bradley v Sarnac Community Schools Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997); *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 151; 662 NW2d 758 (2003). The maxim is only an aid in determining legislative intent and cannot be applied if it defeats that intent. *Houghton Lake, supra,* 151. The maxim is inapplicable here because the provisions within MCL 500.2254 relied on by the trial court are not an express mention by the Legislature of conditions that insurers may provide in contracts. Rather, they are duties the Legislature has imposed on insureds to exhaust available remedies before filing suit and on insurers to promptly pass upon claims.

We also note for comparison purposes, that MCL 500.4046(2), also contained within the Insurance Code of 1956 but pertaining only to policies for life insurance, expressly prohibits the inclusion of a provision limiting the time a suit may be commenced to less than six years. MCL 500.2254, however, is a general provision governing disability, surety, casualty, and also life insurance policies, and contains no such express prohibition against limiting the time an action may be commenced. It states only that no policy provision may be adopted "prohibiting a member or beneficiary from commencing or maintaining suits . . . ." We view this distinction as intentional, and conclude that MCL 500.2254 may not be construed to prevent the inclusion of provisions that do not act as a complete bar to filing suit, but only limit the time it may be done.

Bolstering our conclusion regarding MCL 500.2254 is MCL 500.2833(q) that applies to fire insurance policies, such as the one at issue in Docket No. 247375. MCL 500.2833(q) provides that "[a]n action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability." In Docket No. 247375 the trial court noted that the one-year limitation period contained in the contract was unreasonable. This pronouncement is without merit given the Legislature's mandate that policies like the one issued by defendant Allied contain the one-year limitation period. Because the plain language of the statute mandates that such a policy of insurance contain the one-year limitation, reasonableness is not open to interpretation or determination by the trial court or this Court. *Sun Valley, supra,* 236.

For all of these reasons we conclude the trial courts erred in denying defendants' motions for summary disposition on the ground that MCL 500.2254 prohibits a provision within an insurance contract that limits the time within which an insured may file suit to one year rather than the six-year statute of limitations provided in MCL 600.5807(8).

III. Judicial Tolling

Docket No. 247375

In Docket No. 247375, defendant Allied asserts that the trial court erred in denying its motion for summary disposition because, even with the application of the judicial tolling period provided in *Tom Thomas, supra,* 596-597, plaintiffs did not file suit within one year from the date of loss as provided in the insurance policy. Although Allied raised this argument in its motion for summary disposition, the trial court did not address it because of its determination that that the contractual limitation period was invalidated by MCL 500.2254. Nonetheless, we will review this issue because it presents a question of law and the facts necessary for resolution

have been presented. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc,* 252 Mich App 318, 324; 651 NW2d 811 (2002).

An issue of fact exists regarding the exact date of loss. In its ruling on plaintiffs' motion for summary disposition, however, the trial court determined that plaintiffs had introduced sufficient evidence to establish that the date of loss occurred in late December 2000, after plaintiffs' insurance policy came into effect on December 18, 2000. Based on the trial court's determination and viewing the evidence in the light most favorable to plaintiffs as the nonmoving party, we assume for the purposes of this issue that the loss occurred on December 31, 2000.[3] It is undisputed that plaintiffs filed their complaint on April 3, 2002, approximately 489 days after the date of loss.

Plaintiffs reported their loss on August 17, 2001. Defendant denied plaintiffs' claim on September 6, 2001. Basing the tolling period on these dates, the one-year contractual limitation period was tolled for approximately twenty days. Thus, plaintiffs' suit would be barred by the contractual one-year limitation provided in the policy because they filed their complaint approximately 469 days after the date of loss.

Although they have not responded to defendant's assertions in their brief to this Court, we note that plaintiffs asserted below that the tolling period should not be deemed to have started on August 17, 2001 because plaintiff Moses Robinson testified that in June and July 2001 he attempted obtain the name of his insurer and his policy number, but was unable to procure assistance. Thus, plaintiffs' contended the tolling period should have begun on June 1, 2001. Plaintiffs also asserted that the tolling period should be deemed to have ended on December 21, 2001, rather than on September 6, 2001, because that is when Frodge sent his last letter. Following plaintiffs' schema, the tolling period would have been approximately 204 days, making their suit timely.

Defendant correctly asserts that the tolling period ended on September 6, 2001. Although it did not specifically address the tolling issue, the trial court determined that Frodge's September 6, 2001 letter was not a final denial for the purposes of whether defendant had preserved the other defenses it attempted to assert to plaintiffs' motion for summary disposition. However, the rule adopted by our Supreme Court in *Tom Thomas, supra,* 596-597, is that the limitation period is tolled "until the insurer *formally* denies liability" not at the conclusion of correspondence between the parties. (Emphasis added). Frodge's September 6, 2001 denial letter was a formal denial of liability, and the tolling period ended on that date.

Plaintiffs also asserted that Frodge's December 21, 2001 letter should be considered as the end of the tolling period rather than the September 6, 2001 letter because defendant is statutorily obligated by MCL 500.2254 to "finally pass" upon claims submitted to it within six

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[3] The determination of the exact date of loss is not material to the resolution of this issue. Specifically, in his affidavit, plaintiff Robinson testified that he purchased a new water heater on January 4, 2001. Therefore, the latest date on which the loss could have occurred was January 4, 2001. However, as will be seen below, the period of four days will not be of consequence.

months of the insured's having provided final proofs of loss. Plaintiffs' assertion is without merit because MCL 500.2254 merely mandates that defendant make its final denial within six months of having received the final proofs of loss. It does not require that an insurer's denial of a claim be its final denial for the purposes of ending the judicial tolling period adopted by our Supreme Court in *Tom Thomas, supra,* 596-597.

Plaintiffs also argue that defendant waived the contractual one-year limitation period. Plaintiffs based their assertion on the fact that both Frodge's September 6, 2001 and November 13, 2001 letters of denial contained a clause stating, "[i]f you are aware of any facts that are unknown to us, please call them to our attention so that we may consider them. If additional information develops which changes the facts as presented, please notify us. If I can be of any assistance, do not hesitate to contact me."

Our Supreme Court defined the doctrine of waiver as a judicially created exception to the general rule that a period of limitation runs without interruption. *Cincinnati Ins Co v Citizens Ins Co,* 454 Mich 263, 270; 562 NW2d 648 (1997). Its application precludes the defendant from asserting the limitation period as a defense and, therefore, extends the applicable period for filing suit. *Id.* The elements of equitable estoppel are as follows:

> One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an estoppel absent intentional *or negligent* conduct designed to induce a plaintiff to refrain from bringing a timely action. [*Cincinnati, supra,* 270 (citation omitted; emphasis in opinion).]

Frodge did not promise to pay plaintiffs' claim, commence negotiations, or fail to deny the claim in the September 6, 2001 letter. Rather, the letter expressly denies plaintiffs' claim. Frodge's letters do not amount to intentional or negligent conduct designed to induce plaintiffs to refrain from filing suit within the contractual limitation period. *Cincinnati, supra,* 270.

In support of their argument, plaintiffs also pointed to the affidavit testimony of Robinson and Wassenaar that Frodge called Robinson approximately a week after Frodge inspected plaintiffs' home on August 30, 2001 and offered him a settlement of $3,000. Robinson further testified that he rejected the offer, that Frodge stated that "he would see what he could do," and that one of defendant's representatives called him a few days later to inform him that defendant was not going to pay the claim. Even viewing the evidence in the light most favorable to plaintiffs and assuming that Frodge did make such an offer, it does not invoke the doctrine of estoppel. Defendant's denial of plaintiffs' entire claim on September 6, 2001 came after plaintiff rejected a $3,000 settlement offer. Moreover, by Robinson's own testimony, Frodge made the offer that he declined within approximately a week of the August 30, 2001 meeting, and a representative of defendant promptly notified him that defendant was denying plaintiffs' entire claim "a few days" after Robinson denied the settlement offer. We do not believe that defendant's actions induced plaintiffs to refrain from filing suit, or denied them a reasonable amount of time to file suit.

Even assuming that the tolling period began on June 1, 2001, plaintiffs' claim would still be untimely because the tolling period ended on September 6, 2001. The limitation period would be tolled for approximately ninety-eight days, meaning that plaintiffs' complaint was filed approximately 391 days after the date of loss. Therefore, we decline to address plaintiffs' contention that the tolling period should be deemed to have begun on June 1, 2001.[4]

The trial court in Docket No. 247375 erred by denying defendant Allied's motion for summary disposition. Because we have concluded that plaintiffs' action against defendant was barred by the contractual limitation period, we decline to address defendant's other assertions of error.

Docket No. 251003

In Docket No. 251003, defendant Farm Bureau asserts that the trial court erroneously denied its motion for summary disposition on the alternative ground that plaintiffs' complaint was timely filed because defendant never formally denied their claim, leaving the limitation period tolled.

Defendant contends the trial court erred in applying the tolling doctrine. Defendant asserts that uninsured, or underinsured, motorist coverage is not required by statute but is contractual. For that reason, it asserts that the language of the insurance policy must govern when benefits are awarded, and that judicial tolling may not be applied because the policy does not contain a tolling provision. Defendant essentially contends that the trial court's application of the tolling doctrine adopted by our Supreme Court in *Tom Thomas, supra,* 596-597, equated to its rewriting the contract and abrogating the contractual one-year limitation.

Indeed, underinsured motorist benefits, like uninsured motorist benefits, are not required by statute. *Mate v Wolverine Mutual Ins Co*, 233 Mich App 14, 19; 592 NW2d 379 (1998); *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 470; 556 NW2d 517 (1996). "The scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts." *Mate, supra,* 19. However, defendant's assertion that judicial tolling cannot be applied is misguided.

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[4] We decline to review this issue for two reasons. First, although an independent insurance agency is ordinarily considered to be an agent of the insured rather than the insurer, *Auto-Owners Ins Co v Michigan Mutual Ins Co*, 223 Mich App 205, 215; 565 NW2d 907 (1997); *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995), the parties in this case have offered no evidence regarding whether the Campbell Agency is an independent agent or whether its actions can be imputed to defendant. Second, even if such evidence had been presented and we were to conclude that the Campbell Agency was acting as an agent for defendant, we do not believe that its actions of refusing to help plaintiffs file their claim in June and July of 2001 invokes the doctrine of estoppel, because it does not equate to intentional or negligent action designed to induce plaintiffs to refrain from filing their complaint within the one-year limitation period. *Cincinnati, supra,* 454 Mich 270. In contrast, such refusals by their insurer to accept their claim should have prompted plaintiffs to file suit sooner rather than later.

Plaintiffs' complaint is founded on breach of contract for refusal to pay benefits[5]. In the absence of the contractual one-year limitation period contained in the policy, the time period plaintiffs could file suit would be governed by the six-year statute of limitations set forth in MCL 600.5807(8). *Monti, supra,* 796. Therefore, the contractual limitation is valid as long as it is reasonable and its running is tolled from the date of the accident, as is provided in the policy, until defendant formally denied liability.[6] *Tom Thomas, supra,* 592, 596-597.

Defendant argues that the trial court erred in determining that plaintiffs' complaint was not barred by the one-year contractual limitation because defendant never formally denied liability. The accident occurred on June 20, 1999. Absent tolling, plaintiffs had until June 20, 2000 to file their complaint. Plaintiffs actually filed their complaint on September 5, 2002, more than three years and two months after the accident occurred.

The parties do not dispute that the tolling period began on February 24, 2000, when plaintiffs' attorney made a demand for $100,000 in uninsured motorist benefits, the extent of their policy, to defendant's claims adjuster, Bradley Copeland, during a telephone conversation. Defendant asserts the tolling period also ended on that date because Copeland testified by affidavit that he made a counteroffer during the conversation to settle plaintiff's claim for $25,000. Defendant argues that Copeland's counteroffer was a denial of plaintiffs' claim as a matter of law.

Although a counteroffer is a rejection of an offer for the purposes of contract formation, precluding a meeting of the minds, this canon of contract law is inapplicable. *Harper Bldg Co v Kaplan*, 332 Mich 651, 656; 52 NW2d 536 (1952), quoting *Thomas v Ledger*, 274 Mich 16, 21; 263 NW 783 (1935); *Giannetti v Cornillie*, 204 Mich App 234, 237; 514 NW2d 221, rev'd on other grounds 447 Mich 998; 525 NW2d 459 (1994). *Tom Thomas* plainly states that the judicial tolling period does not end "until the insurer formally denies liability." In this context, defendant's counteroffer was just that, a counteroffer, and not a formal denial of liability. We reject defendant's contention that Copeland's counteroffer was a denial of plaintiffs' claim as a matter of law.

According to Copeland's affidavit testimony, he made the counteroffer on February 24, 2000 and plaintiff's attorney informed him on March 31, 2000 that he wished to hold off on any

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[5] Plaintiff Joe West's loss of consortium claim is derivative, and is dependent upon plaintiff Jane West's breach of contract claim. *Long v Chelsea Comm Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996).

[6] Another panel of this Court recently held in the context of an uninsured motorist claim that a contractual provision stating "Claim of suit must be brought within 1 year of the date of the accident" is unreasonable. *Rory v Continental Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 242847, July 6, 2004). We can envision a fact pattern where the one-year limitation may be reasonable, but we need not reach this issue due to our determination on the judicial tolling issue. It should be further noted that *Rory* concerns an automobile policy and not a homeowners' policy with statutorily mandated provisions as exists in Docket No. 247375 involving defendant Allied.

settlement negotiations until his client underwent surgery on April 4, 2000. Approximately five months later, Copeland attempted to contact plaintiff's attorney by leaving a phone message regarding further settlement negotiations on September 5, 2000. Plaintiff's attorney made no contact with Copeland until July 19, 2002, almost two years later, when he demanded arbitration.

Based on these facts, we must apply the plain language of *Tom Thomas, supra*, and conclude that because there has been no formal denial of the claim, formal denial to pay, or patent negotiation to impasse, judicial tolling did not expire. We affirm the trial court's denial of defendant's motion for summary disposition.

CONCLUSION

MCL 500.2254 does not prohibit insurers from including provisions in their policies that limit the time insureds may file suit to collect benefits that have been denied to less than the time provided in the applicable statute of limitations. However, these limitation periods must be tolled from the time the insured gives notice of his claim until the insurer formally denies liability for the claim. A counteroffer is not a formal denial of liability. And, the limitation period is tolled until the claim is formally denied, not at the conclusion of correspondence between the parties.

Accordingly, the order of the trial court denying defendant Allied's motion for summary disposition in Docket No. 247375 is reversed, as is its subsequent order granting plaintiffs' motion for summary disposition. The trial court shall grant defendant's request for summary disposition. In Docket No. 251003, the order of the trial court denying defendant Farm Bureau's motion for summary disposition is affirmed.

Affirmed in part, reversed in part, and remanded to the respective trial courts consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello